**Editor's note: 85 I.D. 129; Appealed -- aff'd, Civ.No. 78-129 (D.Wyo. Aug. 27, 1979), 474 F.Supp. 654; reversed, No. 79-2290 (10th Cir. Nov. 13, 1981), 664 F.2d 234; reversed, 103 S.Ct. 2218, 462 US 36 (June 6, 1983)**

WESTERN NUCLEAR, INC.

IBLA 76-589 Decided May 22, 1978

Appeal from decision of the Wyoming State Office, Bureau of Land Management, holding appellant liable for trespass damages. WY-03-4025.

Affirmed as modified.

1. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Statutory Construction: Generally -- Stock-Raising Homesteads

   As to gravel, interpretations of the mineral reservation in patents issued by the United States under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), must be consistent with the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.

2. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Statutory Construction: Generally -- Stock-Raising Homesteads

   In determining whether gravel is included in a mineral reservation in a patent issued

under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), the interpretation of the reservation must take into account the intended use for which the land was conveyed and those uses which the Government intended to reserve.

3. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Stock-Raising Homesteads

A patent of land under the Stock-Raising Homestead Act, 43 U.S.C. § 291 et seq. (1970), was not generally intended to give the grantee the right to use the land for mineral development and mineral development was to proceed only under the mineral laws.

4. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Statutory Construction: Generally -- Stock-Raising Homesteads -- Words and Phrases

"Ejusdem generis." The ejusdem generis rule of construction may not be invoked to exclude gravel from the scope of a reservation of "all the coal and other minerals" in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), because this rule of construction can only be effectively applied where there is a series of specific terms which define a class so that one may construe a general term by reference to that class.

5. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Public Lands: Administration -- Stock-Raising Homesteads -- Trespass: Generally

Sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), contemplates the Department of the Interior retaining continuing jurisdiction and administration of mineral deposits reserved by that Act.

6. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Public Lands: Administration -- Stock-Raising Homesteads --

Surface Resources Act: Applicability -- Trespass: Generally -- Words and Phrases

"Public lands." Under 43 CFR 9239.0-7 which defines a trespass, the term "public lands" includes mineral deposits reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970).

7. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Stock-Raising Homesteads -- Surface Resources Act: Generally

The declaration in the Surface Resources Act, 30 U.S.C. § 611 (1970), that no deposit of common varieties of gravel shall be deemed a valuable mineral deposit within the meaning of the mining laws, was not intended to operate as a conveyance, to holders of patents, of any minerals reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970).

8. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Stock-Raising Homesteads

Gravel in a valuable deposit is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970).

9. Appraisals -- Hearings -- Mineral Lands: Generally -- Surface Resources Act: Hearings -- Trespass: Measure of Damages

When the Bureau of Land Management has appraised the damages for a mineral trespass under 43 CFR Part 9230, a hearing will not be ordered and an appraisal will not be disturbed in the absence of an offer of specific substantial evidence that the determination is incorrect.

APPEARANCES: Harley W. Shaver, Esq., Canges & Shaver, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Western Nuclear, Inc., has appealed from the decision of the Wyoming State Office, Bureau of Land Management, in which the Bureau determined that appellant had committed an unintentional trespass on federally owned minerals and held appellant liable for $13,000 in damages for gravel removed from the deposit. Appellant alleges it has also removed sand, but that material is not the subject of the trespass action. Appellant challenges both the fact of the reservation of the gravel and the amount of damages which were imposed.

The State Office cited appellant for trespass involving violation of the Materials Act of July 31, 1947 (61 Stat. 681), as amended, by the Surface Resources Act of July 23, 1955 (69 Stat. 368), 30 U.S.C. § 601 et seq. (1970). The latter act declared, inter alia, that "[n]o deposit of common varieties of * * * gravel * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws * * *." 30 U.S.C. § 611 (1970).

The land on which the trespass had occurred was patented in 1926. The patent reserved to the United States "all the coal and other minerals in the lands so entered and patented together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat. 862-865)," the Stock-Raising Homestead Act, 43 U.S.C.

§§ 291-301 (1970). 1/ The first issue is whether this reservation includes gravel.

1/ These provisions and limitations are set forth at 43 U.S.C. § 299 (1970):

"All entries made and patents issued under the provisions of sections 291 to 301 of this title shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by said sections, for the purposes of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate: Provided, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of sections 291 to 301 of this title with reference to the disposition, occupancy, and use of the land as permitted to an entryman under said sections." (Emphasis added.)

As to compensation for damage to grazing values, see infra.

The State Office appraisal report describes the property as follows:

> The deposit located on the property is an alluvial gravel with 6.4 acres of the 14 acre parcel mined for gravel. * * * There are 6-12 inches of overburden on the site * * *. It is estimated that the deposit thickness will average 10 feet or more in thickness. In the nature of speculation, the deposit could cover up to 40 acres, however this report is restricted to the 6.4 acre area mined. * * *
>
> Highest and Best Use
>
> After investigating the area in and around Jeffrey City based on the site data analysis above it is adjudged that the highest and best use of the property is for a mineral material (gravel) site.
>
> The land was used for grazing before location of the pit and after rehabilitation will most likely be used as grazing land. However, during the time of operation of the pit its highest and most productive use is for a gravel site-mineral material site.

The above conclusion in the appraisal report is based on a technical report of T. W. Holland. Also a part of the appraisal report is a mineral report in which geologist William D. Holsheimer states:

> The gravel is overlain by a soil cover of fairly well developed loamy sand, some 12-18 inches in thickness. There is a relatively good vegetative cover, consisting

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For the subsequent legislative history of 43 U.S.C. §§ 291-98 (1970), see 43 U.S.C. § 315 et seq. (1970) and sec. 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2789. Daniel A. Anderson, 31 IBLA 162 (1977). The Federal Land Policy and Management Act provides that 43 U.S.C. §§ 291-98 are repealed.

mainly of sagebrush, and an understory of various native grasses.

Appellant argues that the mineral reservation issue is governed by the law in effect at the time the grant was made and points to the case of Zimmerman v. Brunson, 39 L.D. 310 (1910), in which the presence of sand and gravel was held not to make the land mineral in character. Although appellant recognizes that this decision was overruled by Layman v. Ellis, 52 L.D. 714 (1929), it contends that sand and gravel were not considered minerals at the time the statute was passed.

In a brief unpublished opinion, the Department has indicated that sand and gravel are minerals reserved to the United States in patents issued under the Stock-Raising Homestead Act, even though such minerals are no longer subject to location under the mining laws. Solicitor's Opinion, M-36417 (February 15, 1957). This Board has also ruled that sand and gravel are reserved in patents issued under another statute, 43 U.S.C. § 315(g) (1970), which reserves "all minerals" to the United States. United States v. Isbell Construction Co., 4 IBLA 205, 78 I.D. 385 (1971). 2/ The arguments raised by appellant, however, have not been fully considered previously, and the reservation in the Stock-Raising Homestead Act has not previously been construed by the Board of Land Appeals.

2/ The Stock-Raising Homestead Act differed originally from the statute construed in Isbell Construction Co., supra, which statute provided from the date of its enactment for compensation for damage to the land as well as to improvements. 43 U.S.C. § 315g(d) (1970).

[1] At the outset, it must be recognized that the appeal concerns construction of a mineral reservation in a patent issued by the United States, and interpretation must be consistent with "the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." United States v. Union Pacific R. Co., 353 U.S. 112, 116 (1957). Under this rule, sand and gravel should be considered as included in a reservation of all minerals to the United States unless it is clear that they were conveyed by the patent under the statute. In United States v. Union Oil Co. of California, 549 F.2d 1271, 1273 n. 5 (9th Cir.), cert. denied, 434 U.S. 930, 98 S. Ct. 121 (1977), the Court cited Union Pacific and held that geothermal resources of previously unrecognized value were reserved under Stock-Raising Homestead patents. The Union Oil ruling at 1274 and 1277 is particularly applicable to the appeal herein:

> * * * The Act's background, language, and legislative history offer convincing evidence that Congress's general purpose was to transfer to private ownership tracts of semi-arid public land capable of being developed by homesteaders into self-sufficient agricultural units engaged in stock raising and forage farming, but to retain subsurface resources, particularly mineral fuels, in public ownership for conservation and subsequent orderly disposition in the public interest. The agricultural purpose indicates the nature of the grant Congress intended to provide homesteaders via the Act; the purpose of retaining government control over mineral fuel resources indicates the nature of reservations to the United States Congress intended to include in such grants.
>
> * * * * * * *

> * * * The report of the House Committee reproduces a letter from the Department of Interior endorsing the bill. The Department notes that "all mineral[s] within the lands are reserved to the United States." H.R.Rep. No. 35, 64th Cong., 1st Sess. 5 (1916).
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> * * * * * * *
>
> The floor debate is revealing. The bill drew opposition because of the large acreage to be given each patentee. See, e.g., 52 Cong. Rec. 1808-09 (1915) (remarks of Rep. Stafford). In response, supporters emphasized the limited purpose and character of the grant. They pointed out that because the public lands involved were semi-arid, an area of 640 acres was required to support the homesteader and his family by raising livestock. E.g., id. at 1807, 1811-12 (remarks of Reps. Fergusson, Martin and Lenroot). They also pointed out that the grant was limited to the surface estate, * * * and they emphasized in the strongest terms that all minerals were retained by the United States. [Emphasis added.]

The primary issue herein is whether gravel constitutes a "mineral" resource under the Stock-Raising Homestead Act. The Act and its legislative history support a broad interpretation of the scope of the mineral reservation. Although no reference to gravel appears in the statute or legislative history, we believe that holding gravel to be a reserved mineral is consistent with Congress' dual purpose in conveying land for stock-raising purposes and retaining the right to develop all minerals.

[2] The Stock-Raising Homestead Act was enacted to encourage further settlement on public land and increase the supply of livestock. It was recognized that vast unpopulated areas of the West were semi-arid in character so that even 320 acres, the maximum entry under

existing agricultural land laws, would not be sufficient to support a family. Although such land might not be suitable for farming, it was suitable for raising livestock, and the desire to see such land settled led to the consideration of legislation which evolved into the Stock-Raising Homestead Act. The Act provided for entry of 640 acres of land designated by the Department as stock-raising land, which was defined as

> * * * lands the surface of which is * * * chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family * * *.

43 U.S.C. § 292 (1970). The acreage that could be entered was double the maximum entry under existing agricultural entry laws, and Congress perceived the need to ensure that mineral resources would not be conveyed under what was a form of agricultural disposal.

Before 1909, lands which were mineral in character were subject to disposal only under the mineral laws. United States v. Sweet, 245 U.S. 563, 567-72 (1918). Because such land was not subject to disposal under the agricultural land laws, a homestead entry on mineral land could be canceled after a mineral claimant had established the mineral character of the land in a contest proceeding. See, e.g., Layman v. Ellis, supra, in which a homestead entry was canceled to

[3] The very name of the Act, and the requirement of designation of the land as stock-raising land ("land the surface of which is * * * chiefly valuable for grazing and raising forage crops * * *") prior to entry, underscore the limited purpose of the grant. United States v. Union Oil Co. of California, supra at 1277. The text of the mineral reservation provision makes clear that a patent of land for stock raising purposes was not to give the grantee the right to use the land for mineral development and that mineral development was only to proceed under mineral laws then in effect or those that may later come into effect. This intent is further emphasized in the legislative history of the statute.

The comments of this Department were included in the report of the House Committee on the Public Lands which recommended enactment of the legislation:

> * * * Another reason for the reservation of the minerals is that this law will induce the entry of lands in those mountainous regions where deposits of mineral are known to exist or are likely to be found. To issue unconditional patents for these comparatively large entries under the homestead laws might withdraw immense areas from prospecting and mineral development, and without such a reservation the disposition of these lands in the mineral country under agricultural laws would be of doubtful advisability.
>
> The farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming, which operations can be carried on without being materially interfered with by the reservation of minerals and the prospecting for and removal of same from the land. [Emphasis added.]

H.R. Rep. No. 35, 64th Cong., 1st Sess. 5 (1916).

the extent that it included a sand and gravel deposit. However, various statutes were enacted in 1909, 3/ 1910, 4/ and 1914 5/ which permitted agricultural entries on lands valuable for specified minerals but which reserved such minerals to the United States. The mineral reservation provisions of the 1910 and 1914 Acts provided the models for the mineral reservation provision of the Stock-Raising Homestead Act, except that the Stock-Raising Homestead Act required a reservation of "all the coal and other minerals" rather than specifically mentioned minerals.

The Stock-Raising Homestead Act is predicated on the concept that land may be subject to multiple uses and that designation for one form of use should not preclude disposal for other possible uses. Thus, interpretation of a conveyance under the Act must take into account the intended use for which the land was conveyed and those uses which the Government intended to reserve. United States v. Union Oil Co., supra; see Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931). 6/

3/ An Act for the protection of the surface rights of entrymen, 30 U.S.C. § 81 (1970), which provided for reservation of coal.
4/ An Act to provide for agricultural entries on coal lands. 30 U.S.C. §§ 83-85 (1970).
5/ An act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic materials. 30 U.S.C. §§ 121-123 (1970).
6/ In Skeen, supra at 1046, the Court stated:
"* * * The legislative history of the Stockraising Homestead Act when it was reported for passage including the discussion that followed relevant to this subject leave us no room to doubt that it was the purpose of Congress in the use of the phrase 'all coal and other minerals' to segregate the two estates, the surface for stock-raising and agricultural purposes from the mineral estate, and to grant the former to entrymen and to reserve all of the latter to the United States."

The House report itself makes the following comment on the provisions:

> It appeared to your committee that many hundreds of thousands of acres of the lands of the character designated under this bill contain coal and other minerals, the surface of which is valuable for stock-raising purposes. The purpose of section 11 is to limit the operation of this bill strictly to the surface of the lands described and to reserve to the United States the ownership and right to dispose of all minerals underlying the surface thereof. The section also provides a method for the joint use of the surface of the land by the entryman of the surface thereof and the person who shall acquire from the United States the right to prospect, enter, extract, and remove all minerals that may underlie such lands, this method to be under the direction of the Secretary of the Interior under such rules and regulations as he may prescribe. [Emphasis added.]

Id. at 18.

The record of the floor debates also demonstrates the limited purpose of the patent and the broad effect of the mineral reservation. When queried as to whether the reservation included oil, Representative Ferris, chairman of the Committee on the Public Lands and sponsor and manager of the legislation responded as follows:

> Mr. FERRIS. It would. We believe it would cover every kind of mineral. All kinds of minerals are reserved; and, more than that, it does not apply to timberlands or to lands susceptible of irrigation or any land that can get water from any known source. It merely gives the settler who is possessed of any pluck an opportunity to go out and take 640 acres and make a home there. * * *

> Mr. MOORE of Pennsylvania. If any oil should be discovered on these lands later on, the Government's right to that oil would be preserved under this mineral clause, would it?
>
> Mr. FERRIS. Yes; and further, this act authorizes the reentry upon these lands to extract oil and coal and anything else in the way of minerals that may be on it.
>
> Mr. MOORE of Pennsylvania. The gentlemen does not think it is necessary to specify oil?
>
> Mr. FERRIS. No. That is a mineral. But I have no objection to it being mentioned specifically if it is at all thought necessary. I feel doubly sure, however, it is not.
>
> Mr. MOORE of Pennsylvania. It has been called to my attention that the word "mineral" would not include oil.
>
> Mr. FERRIS. I do not think it is necessary; but if the gentleman thinks there is any conceivable doubt about it we will put it in, because not a single gentleman from the West who has been urging this legislation wants anybody to be allowed to homestead mineral land. This does not apply to a single acre of land in my own State, and therefore I have no selfish interest in it. But these gentlemen who are interested in it do not want to homestead mineral land or ordinary homestead land or oil land. [Emphasis added.]

53 Cong. Rec. 1171 (1916).

Indeed, the broad scope of the reservation and the limited nature of the grant drew objections from Representative Mondell who compared the provisions of the proposed legislation with the provisions of earlier legislation 7/ which provided for agricultural entry of mineral lands: "They [patents under the earlier statutes] convey fee titles. They give the owner much more than the surface; they

7/ See notes 3-5, supra.

give him all except the body of the reserved mineral." 53 Cong. Rec. 1234 (1916). In later debates, he objected:

> In the first place, I think the fact should be emphasized that the bill establishes a new method and theory with regard to minerals in the land legislation in our country. It reverts back to the ancient doctrine of the ownership of the mineral by the king or the crown and reserves specifically everything that is mineral in all the land entered. It was, it was claimed, necessary to accept a provision of that kind in order to secure the larger acreage. The Interior Department insisted upon it, and many supported that view. My own opinion is that that policy is not wise and that in the long run it will be found to be infinitely more harmful than beneficial or useful or helpful to anyone, either the individual or the public generally. When one takes into consideration the wide range of substances classed as mineral, the actual ownership under a complete mineral reservation becomes a doubtful question.

54 Cong. Rec. 687 (1916).

Neither the Act nor its legislative history indicate any reason to treat gravel differently from its treatment in other Departmental decisions which, under other statutes, hold gravel to be a mineral. E.g. Layman v. Ellis, supra, and United States v. Isbell Construction Co., supra. Patents under the Stock-Raising Homestead Act were issued for homesteads, not for gravel enterprises. The patent was not intended to convey the right to use the land for mineral development, that right being reserved to the United States for appropriation under the mineral laws.

The Ninth Circuit in United States v. Union Oil Co. of California, supra, at 1273-74, n. 5, has ruled:

> This is basically a question of legislative intent * * *. To the extent that the argument rests on the meaning of the word [minerals] itself, however, the government is entitled to have the ambiguity resolved in its favor * * *.
>
> Appellees argue that the term "minerals" is to be given the meaning it had in the mining industry at the time the Act was adopted * * *. This is a minority rule, United States v. Isbell Constr. Co., 78 Interior Dec. 385, 390-91 (1971), even as applied to permit conveyances. 1 American Law of Mining § 3.26, at 551-53 (1976).

Appellant does not fully set forth the effect of Layman in overruling Zimmerman. Layman was not merely a decision which held that sand and gravel would prospectively be deemed minerals; the decision resolved a conflict between parties that had already entered the land and canceled an existing homestead entry to the extent that it included sand and gravel deposits. Furthermore, Layman specifically points out that Zimmerman was not an accurate statement of the law in 1910 and points to a number of contemporary authorities which conflict with Zimmerman. Even if we were bound to construe the reservation in accordance with the law in effect when the patent was issued or when the statute was enacted, there is no reason to believe that Congress intended the reservation to be subject to the erroneous rule in Zimmerman rather than those other authorities. 8/

8/ In 1913, the U.S. Geological Survey regarded the presence of gravel as a sufficient basis for classifying land as mineral. U.S. Geological Survey, Department of the Interior, Bulletin 537, The Classification of the Public Lands, 138-42 (1913).

Appellant through its counsel contends that the surface of the land consists of sand and gravel and that we should not deem these substances as reserved because their development would destroy the surface and thus nullify the patent. Appellant's argument obscures the Congressional intent to reserve mineral resources for disposal under the mineral laws. If a mineral is not reserved when its development would injure the surface, then even coal in shallow deposits would pass to the homesteader, despite the unambiguous intent of the Act.

We recognize that there is a significant body of law to the effect that mineral reservations do not include the right to destroy the entire surface in developing the mineral. Such rulings arise from the concern that the grantor would have retained dominion over that which he purportedly conveyed and that the grantee would be deprived of the very substance of his bargain without compensation. 9/ Holding gravel to be a reserved mineral does not deny the holder of a

9/ The New Mexico Supreme Court has held that a rock deposit is not a mineral reserved under the Stock-Raising Homestead Act. State ex rel. State Highway Comm'n v. Trujillo, 82 N.M. 694, 487 P.2d 122, 125 (S. Ct. N.M. 1971). The case involved a dispute between the holder of land under a Stock-Raising Homestead patent and a state agency authorized by the BLM to remove reserved mineral material from the land. Although the state court did not exercise jurisdiction over the interest of the United States in the rock deposit, it purported to apply Federal law. However, the court expressly rejected the analysis taken in Skeen v. Lynch, supra, and held that Congress did not intend to reserve rock.

The Ninth Circuit, in Union Oil Co., supra, at n. 11, relied upon Skeen and recognized that the State Highway Commission decision was not in harmony with the legislative history of the Stock-Raising Homestead Act. The Supreme Court of New Mexico has subsequently held sand and gravel to be reserved under a reservation of all minerals in G. W. Burris v. State ex rel. State Highway Commission, 88 N.M. 146, 538 P.2d 418 (S. Ct. N.M. 1975), but distinguishes Trujillo, supra.

stock-raising homestead patent the substance of his bargain without compensation, because the Act provides for compensation for damages to crops and improvements. In 1949 Congress provided also for compensation for damage to grazing values. 10/ In neither the statute's specific reservation of coal nor in its legislative history, is there any indication that surface deposits of coal or other minerals should be deemed excluded from the mineral reservation.

[4] Appellant points out that the reservation does not reserve "all minerals" 11/ but "all the coal and other minerals." Appellant argues that under the principle of ejusdem generis, sand and gravel are not "other minerals" because they are not similar to coal. However, this rule of construction is applicable where there is a series of specific terms which define a class so that one may construe a general term by reference to that class. See 2A Sutherland, Statutes and Statutory Construction, § 47.18 (4th ed. C. D. Sands 1973). If a dissimilarity with coal were a sufficient basis for excluding a given mineral from the scope of the reservation, then the expression "other minerals" would be only surplusage because every other mineral can be distinguished from coal. Clearly, the use of ejusdem generis is not appropriate because the term "coal" provides an insufficient specific enumeration on which to base a construction of the general term "other minerals." Id. § 47.20. Such rules of construction are

10/ Section 5 of the Act of June 21, 1949, 30 U.S.C. § 54 (1970).
11/ The statute construed in United States v. Isbell Construction Co., supra, required a reservation of "all minerals." 43 U.S.C. § 315(g) (1970).

only aids in determining the legislative intent and ought not to be invoked as obstacles to prevent the intent from taking effect. Id. § 47.22. See, e.g., Skeen v. Lynch, supra. 12/

[5] Appellant contends that the patenting of the land in this case removed it from the status of public land under 30 U.S.C. §§ 601-03 (1970), and that this Department has no jurisdiction over the gravel deposit in issue. This argument ignores the fact that section 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), clearly contemplates the Department's continuing jurisdiction and administration of deposits reserved by that Act. Such deposits fall within the ambit of the Department's enforcement authority. 43 U.S.C. § 1201 (1970).

[6] "The extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass * * *." 43 CFR 9239.0-7. See also 43 CFR 3602.1. Although 43 CFR 9239.0-7 refers to "public lands," that term can only be defined in context. It is not a term of art having a specific legal effect. Ben J. Boschetto,

12/ In Bumpus v. United States, 325 F.2d 264 (10th Cir. 1963), the court applied the ejusdem generis rule in holding that sand and gravel were not included in a reservation of "oil, gas and other minerals." The reservation was in favor of a private party who had conveyed land to the United States for reservoir purposes, and the case did not involve construction of a Federal land grant. Furthermore, the rule was applied only when the court determined that the result would be consistent with the intent of the parties to the transaction.

21 IBLA 193 (1975). In certain contexts, "public land" includes any interest in land administered by the Bureau of Land Management. See, e.g., 43 U.S.C.A. § 1702(e) (West Supp. 1977). The term must be broadly defined when it is used to describe the Department's administrative responsibility to protect mineral resources reserved by the Stock-Raising Homestead Act.

[7] Under 30 U.S.C. § 611 (1970), the status of gravel was only affected in connection with the mining laws. The mineral remains reserved under the Stock-Raising Homestead Act; the Surface Resources Act was not intended to operate as a conveyance of any reserved minerals to holders of stock-raising homestead patents. Solicitor's Opinion, M-36417, supra. The effect of the statute was to withdraw gravel deposits including those reserved under the Stock-Raising Homestead Act from appropriation under the mining laws. Development of gravel deposits on "public lands" should therefore be consistent with the terms of the Materials Act as amended by the Surface Resources Act. 30 U.S.C. § 601 (1970).

[8] It thus is clear that gravel in a valuable deposit is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act.

[9] The State Office determined that appellant owed $13,000 in damages for the removal of about 43,000 cubic yards of material

valued at a royalty rate of 30 cents per cubic yard. 13/ Appellant argues that this determination is arbitrary, capricious, and unreasonable because appellant leases a similar site from the State of Wyoming and pays only six cents per cubic yard. However, it appears from the record that the 6-cent rate was established by a State agency in 1969 and has not been updated since then, and the record does not make clear that the State established its rate on the basis of then fair market value.

The State Office determination was based upon an appraisal report which considered four sites. The report indicated the royalty rates for materials from those sites, and the sites were compared with the deposit herein concerned on the basis of location, character of the material, access, depth of the material, and thickness of overburden. No comparable evidence was offered by appellant. A hearing will not be ordered in the absence of a specific factual assertion that would show an appraisal is incorrect. XYZ Television, Inc., 33 IBLA 80, 81 (1977). Where the Bureau of Land Management has appraised the

13/ The appraisal report states the royalty reflects the value in the ground. Departmental regulation 43 CFR 9239.0-8 provides that the measure of damages is determined by the laws of the state in which the trespass is committed. We are aware of no provision of Wyoming law which limits damages to only the royalty value of the material removed, and where state law provides for compensation for damages, the measure of damages may be somewhat higher than the royalty value of the material removed. See Knife River Coal Mining Co., 70 I.D. 16, 18 (1963). Our affirmance of the decision below should not be construed as fixing a limited rule for assessment of damages.

damages for a trespass, the appraisal will not be disturbed in the absence of substantial evidence that the determination is in error. Hub Lumber Company, A-29527 (September 17, 1963). 14/ Appellant's position was extensively briefed, and neither Appellant nor the Solicitor's Office responded to the invitation to submit written argument as to the effect of the recently decided United States v. Union Oil Company of California, supra. Accordingly, Appellant's request for a hearing and oral argument is denied.

Assuming the State Office figure of 30 cents per cubic yard is a reasonably accurate appraisal, and that the amount of material taken in trespass is 42,675 cubic yards, 15/ as reported by Western Nuclear in its letter of January 7, 1976, and apparently accepted by BLM, the payment due is not $13,000 as rounded-off by the appraiser, but rather the sum due is $12,802.50.

14/ A similar rule applies to appraisals used to determine charges for use and occupancy of rights-of-way. See e.g., Mountain States Telephone and Telegraph Co., 26 IBLA 393, 83 I.D. 332 (1976).

15/ On October 22, 1975, Gary Fletcher of Western Nuclear stated to BLM geologist William D. Holsheimer that 64,333 yards have been used and some 32,000 yards stockpiled.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Joseph W. Goss
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Douglas E. Henriques
Administrative Judge